

ISSUE

May a Judge handle cases where the judge's son was in charge of or a part of an investigation which resulted in the issuance of citations and/or charges?

ANSWER

No

FACTS

A joint Municipal Court presides over a community that is administered to by a police department that employs three full time police officers and a part time police chief. The Judge's son is one of the full time officers.

DISCUSSION

The committee addressed a similar question in Opinion 04-1 when it was asked if a part time Municipal Judge may have an "of counsel" relationship with a law firm. The committee's response read in part *"These appearances are viewed from the perspective of the public, which expects a high standard of conduct on the part of judges..."* The committee has also addressed a related issue in Opinion 00-1 which dealt with a judge hearing cases in which attorneys from the law firm in which the judge's niece practices, represents litigants before the judge. The answer was *"yes, with some caution"*. More directly the committee finds that this issue is covered under the following Supreme Court rule and sections:

Supreme Court Rule 60.04 (4)

States: Except as provided in sub. (6) for waiver, a judge shall recuse himself or herself in a proceeding when the facts and circumstances the judge knows or reasonably should know establish one of the following or when reasonable, well-informed persons knowledgeable about judicial ethics standards and the justice system and aware of the facts and circumstances the judge knows or reasonably should know would reasonably question the judge's ability to be impartial:

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Absent a valid waiver under **SCR 60.04 (6)** the judge must recuse based on the fact that there is an inevitable appearance of bias if the judge's son were the arresting officer. Further that appearance of bias is prevalent if the son were not the arresting officer but had any significant involvement in the case. Pursuant to Wisconsin Statute officers may rely on reports of fellow officers to initiate or conduct an investigation or to act by way of arrest while in their official capacity. The Judge's son may at some point have particular knowledge regarding an incident that can be shared and then relied upon by fellow officers. This places the Judge's son in the position of being a potential material witness.

Supreme Court Rule 60.04 (4) (e) 3.

States:

(4) Except as provided in sub. (6) for waiver, a judge shall recuse himself or herself in a proceeding when the facts and circumstances the judge knows or reasonably should know establish one of the following..

- (e) The judge or the judge's spouse, or a person within the third degree of kinship to either of them, or the spouse of such a person meets one of the following criteria:
- 3. Is known by the judge to have a more than a *de minimis* interest that could be substantially affected by the proceeding.

If the Judge's son were the arresting officer then the son's involvement would be directly impacted by any decision made by the court.

Supreme Court Rule 60.04 (4) (e) 4.

States:

(4) Except as provided in sub. (6) for waiver, a judge shall recuse himself or herself in a proceeding when the facts and circumstances the judge knows or reasonably should know establish one of the following..

- (e) The judge or the judge's spouse, or a person within the third degree of kinship to either of them, or the spouse of such a person meets one of the following criteria..
- 4. Is to the judge's knowledge likely to be a material witness in the proceeding.

While it may not occur in all situations there are certainly times that the officer in question may be placed in a position that he would be considered a material witness. It is not necessary for an individual to testify in order to qualify as a material witness but having knowledge of the particular incident before the court may place a person in such a status. The son of the Judge, being within the third degree of kinship, would consequently fall into this category.

CONCLUSION

A judge may not handle cases where the judge's son was either in charge of or part of any investigation leading to citations or charges pending before the court. The judge must recuse himself if the judge's son has any significant involvement in the case.

APPLICABILITY

This opinion is advisory only, is based on the specific facts and questions submitted by the petitioner to the Judicial Conduct Advisory Committee and is limited to questions arising under the Supreme Court Rules, Chapter 60- Code of Judicial Conduct. This opinion is not binding upon the Wisconsin Judicial Commission or the Supreme Court in the exercise of their judicial discipline responsibilities. This opinion does not purport to address provisions of the Code of Ethics of Public Officials and Employees, subchapter III of Chapter 19 of the statutes.

I hereby certify that this is Formal Opinion 06-2 issued by the Judicial Conduct Advisory Committee for the state of Wisconsin on this 12th day of October, 2006.

/s/ George S. Curry

George S. Curry
Chair